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7 UNITED STATES DISTRICT COURT
8 DISTRICT OF NEVADA
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10 UNITED STATES OF AMERICA,

3:95-CV-00757-HDM

11 Plaintiff,

12 and

ORDER ON MOTION TO STRIKE

13 PYRAMID LAKE PAIUTE TRIBE OF
14 INDIANS,

15 Intervenor-Plaintiff,

16 v.

17 BOARD OF DIRECTORS OF THE
18 TRUCKEE-CARSON IRRIGATION
19 DISTRICT, individually and as
20 Representatives of the Class of
all Water Users in the Newlands
Reclamation Project; TRUCKEE-
CARSON IRRIGATION DISTRICT,

21 Defendants,

22 and

23 STATE OF NEVADA, Department of
Conservation and Natural
Resources, Division of Wildlife
24 and Division of State Lands;
CHURCHILL COUNTY; DODGE
25 BROTHERS AND DOGE JR. FAMILY
TRUST; DAVID P. HARRIGAN;
26 GEORGE AND SHELLY RAE
RAKURSHIN; WILLIAM D. AND
27 GWENDOLYN WASHBURN; MARVIN
WEISHAUP; HOWARD D. WOLF
28 FAMILY TRUST; RAY CONLAN;

1 CORKILL BROS., INC.; CALVIN R.
2 MOFFITT AND CANDACE J. MOFFITT;
3 BELL FAMILY TRUST; LARRY L.
4 FRITZ FAMILY TRUST; DAVID L.
5 MATLEY AND CHRISTINE L. MATLEY
6 FAMILY TRUST AND DAVID MATLEY;
7 HAROLD G. AND RHONDA JOHNSON
8 AND JOHNSON FAMILY TRUST; A&A
9 DAIRY; JOYCE LOHR; PERALDO
10 BROTHERS; STILLWATER FARMS,
11 INC.; CHARLES P. FREY, JR. AND
12 DEBRA S. FREY; NORMAN W. FREY;
13 FALLON-PAIUTE SHOSHONE TRIBE,

14 Intervenor-Defendants.
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16 The government and the Pyramid Lake Paiute Tribe of Indians
17 ("Tribe") have filed a motion to strike (#850) the declaration of
18 Walter S. Winder, attached to TCID's reply brief in response to the
19 court's order on remand (#848-1), as well as any parts of TCID's
20 reply that rely thereon. They argue that Winder is an expert
21 witness who was not timely disclosed before trial and has not been
22 qualified, and that he cannot qualify as a lay witness because his
23 opinions are highly specialized. Further, they argue the
24 declaration contradicts evidence in the record that was relied on
25 by the court, the Ninth Circuit, and TCID. Finally, they note that
26 trial is complete and the court has not reopened the record for
27 additional evidence such as Winder's declaration.


28 TCID opposes the motion (#851), arguing that Winder is not an
expert but is a lay witness because his opinions are based on his
expertise acquired from his employment. TCID further argues that
Winder's declaration is intended only to summarize facts and
evidence in the record to explain what the maximum allowable
diversion for the Carson Division in 1985 should have been in
response to the Ninth Circuit's direction that the record be

1 developed on "the issue of gauge data" and recoupment for 1985 and
2 1986 be recalculated. TCID denies the declaration contradicts
3 evidence in the record.

4 Winder's declaration does not merely summarize evidence
5 already in the record; it reinterprets and in some cases
6 contradicts it. For example, the court has already concluded that
7 the OCAP maximum allowable diversion for 1985 was 335,000 acre
8 feet. (Order Dated Dec. 2, 2003 at 15). This is the number
9 reflected in Exhibit 1805, the chart on which the court has relied
10 to calculate the amounts subject to recoupment. The court's
11 finding in this regard was not disturbed on appeal. Winder's
12 declaration, by way of contrast, asserts the actual maximum
13 allowable diversion should have been 353,000 acre feet. Such
14 reformulation of the evidence is beyond the scope of the Ninth
15 Circuit's mandate, which ordered the court to simply recalculate
16 the water subject to recoupment for 1985 and 1986 by removing the
17 gauge error. It did not order the court to reopen all evidence
18 bearing on recoupment for 1985 and 1986 for argument and
19 reanalysis. Further, Winder's declaration was not part of the
20 original record in this action, and the court did not reopen the
21 record and invite the parties to submit additional evidence.
22 Accordingly, the declaration is not properly before the court, and
23 the government and Tribe's motion to strike (#850) is **GRANTED**.

24 **IT IS SO ORDERED.**

25 DATED: This 11th day of May, 2015.

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28 UNITED STATES DISTRICT JUDGE